No. 12862.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC., a corporation,

Appellees.

APPELLEE'S PETITION FOR REHEARING.

LESLIE F. KIMMELL,
215-D Ocean Avenue,
Laguna Beach, California,
Attorney for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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To the United States Court of Appeals for the Ninth Circuit:

Judgment for the appellee, Susan C. Kimmell, has been reversed upon the sole ground that the trial court's findings that the reproduction and distribution of the Gaelic manuscript amounted to a limited and restricted publication only, that there was no general publication of it, and that the manuscript was not in the public domain, were not justified by the evidence. The opinion filed January 7, 1952, contains the following statement:

> "It appears to us that the Court disregarded in large part vital and uncontradicted testimony, notably that of White's secretary (W. N. Maguire), and of Mrs. Oettinger."

It is now clear that counsel for the appellee gave inadequate attention in his brief to what has turned out to be the crucial point of the case. In justice to the appellee, and before she is deprived of her rights as owner of the Gaelic manuscript, this Court is petitioned to grant a rehearing so that consideration may be given to the following points:

I. Rule 52(a), Rules of Civil Procedure, 28 U. S. C. A., is applicable to this case.

II. It was the province of the trial judge to pass upon the credibility of the witness Maguire.

III. The trial Judge had the responsibility of evaluating the testimony of the witness Oettinger.

IV. There was substantial evidence before the trial Court to support the findings of fact.

V. The findings are not clearly erroneous within the meaning of Rule 52(a).

I.

Rule 52(a), Rules of Civil Procedure, 28 U S. C. A., Is Applicable to This Case.

Rule 52(a) reads in part as follows:

> "In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses . . ."

In *Sawyer v. Crowell Pub. Co.* (2 Cir., 1944), 142 F. 2d 497, a suit for copyright infringement, the Court on page 499 said:

> "On the record as it stands we cannot say that the Court's findings of fact above quoted was clearly erroneous. The rule that only such a finding may be set aside is as applicable to an action for copyright infringement as any other action." Citing *Darrell v. Joe Morris Music Co.* (2 Cir.), 113 F. 2d 80.

Other cases involving literary property in which the rule is invoked are as follows:

Egner v. E. C. Schirmer Music Co. (1 Cir., 1943), 139 F. 2d 398;

Esquire Inc. v. Varga Enterprises (7 Cir., 1950), 185 F. 2d 14.

II.

It Was the Province of the Trial Judge to Pass Upon the Credibility of the Witness Maguire.

The testimony of the witness Maguire was given in open Court where the trial Judge had an opportunity to observe her demeanor. If the trial Judge disregarded those portions of her testimony bearing on the question of publication, then the conclusion is inescapable that he doubted her credibility. Since she testified from memory as to the alleged contents of the letter of transmittal mentioned in the opinion filed January 7, 1952, which letter was written in 1933, some 17 years prior to the trial,[1] he was obliged to question the soundness of her memory. In *Egner v. E. C. Schirmer Music Co.,*

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[1]The approximate date of the letter written 17 years previously is arrived at by referring to portions of the testimony of the witness Maguire and of the appellant. The pertinent portions of the testimony of Maguire are as follows:

"Q. Did you have these copies covered or bound in any fashion? A. I had them bound in the local newspaper shop. I had no press facilities.

Q. I show you at this time, Mrs. Maguire, a mimeographed manuscript which has a *light blue cover on the front and back,* and a dark blue binding, and I ask you if you recognize what this object which I now hand you purports to be? A. Yes, this is one of the first issues or first printings that we made of 'The Gaelic Manuscript'." [Tr. p. 81.] (Emphasis added.)

* * * * * * * * *

"Q. Do you have a copy at this time of the letter or letters written to these 18, or thereabouts, persons, under the circumstances you have just described? A. No, I do not.

Q. Do you know whether or not at this time any copy of that original letter exists? A. I am sure it does not." [Tr. p. 84.]

Pertinent portions of the testimony of appellant are as follows:

"Q. Now, approximately when did Stewart Edward White produce the first copy of 'The Gaelic'—or a copy of the manu-

supra, where a witness Mayer testified from memory as to an alleged assignment made some 20 years previously of the author's rights in a song, the Court said:

> "The plaintiffs attack the findings of fact by the trial Court as being contrary to the testimony of Mayer, but it is the function of the finder of fact, in this case the trial Judge, to evaluate the testimony. This evaluation involves not only a determination as to the honesty and credibility of the witness, but, in the case of Mayer, *as to the soundness of memory of transactions 20 years after the date of their occurrence.* We cannot say that the findings of fact by the trial Court were clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A." (Emphasis added.)

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script as a manuscript in its present form? A. *In the fall of 1933."* [Tr. p. 61.] (Emphasis added.)

* * * * * * * * *

"Q. At the time that Stewart Edward White, or about the time that he compiled 'The Gaelic Manuscript', I think you said about *the fall of 1933,* did you obtain a copy of the compiled work? A. Yes, I did.

Q. In what form did you receive it? A. He sent it to me with a letter, and *it was a book, a blue book, paper-bound; not a regular published book, but it was a mimeographed—mimeographed sheets that were bound together in a blue paper binder.*

Q. Did you receive any communication of any kind from Stewart Edward White concerning this manuscript at or about the time you got the copy? A. Yes, I did.

Q. What was the form of that communication? A. The letter.

Q. Do you now have the letter? A. No, I don't.

Q. Do you know whether or not such letter is now in existence? A. I am pretty sure not, because I made no practice of keeping those letters.

Q. Do you have a recollection as to the substance and contents of that letter? A. Pretty fairly well." [Tr. pp. 63-64.] (Emphasis added.)

Particular attention is called to the strong opinion in *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.* (2 Cir., 1949), 175 F. 2d 77, 80, before L. Hand, Chief Judge, and A. N. Hand and Frank, Circuit Judges. The action was for an infringement of a copyright. The testimony of a witness was uncontradicted and unimpeached by anything appearing in the record, and was not inherently improbable. It was contended that the trial Judge was obligated to accept such testimony as true, and that his refusal so to do was "clearly erroneous." In the opinion by Frank, J., the following language appears:

> "The demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial Court by his manner, his intonations, his grimaces, his gestures and the like—all matters which 'cold print does not preserve' and which constitutes 'lost evidence' so far as the Upper Court is concerned. For such a Court, it has been said, even if it were called a 'rehearing Court,' it is not a 'reseeing Court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript' correct in every detail fails to reproduce tones of voice and hesitation of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. It resembles a pressed

flower. The witness's demeanor, not apparent in the record, may alone have impeached him. The alleged 'rule,' if taken literally, would return us to the practice of trial by deposition, which common law procedure rejected and which, in recent years, has been rejected in Federal noncommon law trials as well.

"Without doubt, the result of our procedure is to vest the trial judge with immense power not subject to correction even if misused. His estimate of an orally testifying witness's credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying; but, unless the Judge reveals of record that he used such an irrational test of credibility, an Upper Court can do nothing to correct his error. We thus have what Tourtoulon called the 'sovereignty' of the trial Judge. Demeanor, to be sure, is no infallible guide to reliability of testimony; yet as matters now stand, it is one of the best guides available."

In *Wittmayer v. United States* (9 Cir., 1941), 118 F. 2d 808, 811, before Garracht and Healy, Circuit Judges, and St. Sure, District Judge, the following statement of the rule appears:

"As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U. S. 631, 636, 39 L. Ed. 289) the case is preeminently one for the application of the practical rule that so far as the findings of the trial Judge who saw the witnesses 'depends upon

> conflicting testimony or upon the credibility of the witnesses, or so far as there is any testimony consistent with the findings, it must be treated as unassailable.' "

Also, in *Grace Bros. Inc. v. Commissioner of Internal Revenue* (9 Cir., 1949), 173 F. 2d 170, before Mathews and Healy, Circuit Judges, and Yankwich, District Judge, the following pertinent statement appears:

> "In the application of this rule * * * reviewing Courts have emphasized the importance of the conclusions of the trial Judge which derive from his opportunity to pass upon the credibility of witnesses. And they have declined to resolve the conflict in the testimony of witnesses their own way."

From the foregoing authorities it is difficult to see how this Court can question the determination of the trial Judge to disregard the testimony of the orally-testifying witness Maguire.

Possibly the trial Judge found it necessary to question the soundness of the memory of appellant, also.

III.

The Trial Judge Had the Responsibility of Evaluating the Testimony of the Witness Oettinger.

The value of the testimony of the witness Oettinger must be determined in the light of its manifest vagueness and confusion. This is illustrated by the following excerpt from her testimony:

> "Q. But prior to his letter of May 18, 1945, as far as you can recall, there was no restriction about what you could do? A. No.
>
> Q. With the manuscript? A. In the discussion that we had about it, I believe that I made some kind of remarks about, 'Of course, we will just mimeograph it and distribute it at—or to friends,' or something like that. 'Give these people that want copies.' It wasn't—the whole thing was so informal that it is hard to remember even.
>
> Q. But there was no definite limitation as to whom you could sell or give copies? A. No, he never did." [Tr. p. 117.]

In one breath she says that the manuscript is to be distributed only to friends, and in the next she says that there was no limitation as to whom copies could be sold or given. And along with the contradiction she admits that she does not remember what the arrangement was with Stewart Edward White which was made some ten years prior to the time of the trial. Yet the letter written in 1940 by Stewart Edward White to the appellee [Deft. Ex. "A"], which is set forth at length

in the opinion filed January 7, 1952, shows that there was an agreement between the author and the witness that mimeographed copies of the manuscript would be passed around among a limited, ascertained group or class, to-wit, *"such of their friends who want copies."* It is strongly urged that this letter and this testimony must be considered together and that the letter, being a written record, is the stronger evidence. (Emphasis added.)

It is submitted that the rule laid down in *Egner v. E. C. Schirmer Music Co., supra,* particularly applies to this witness; and that therefore the evaluation given to the testimony of this witness by the trial Court is not clearly erroneous.

Referring to the letter written by Stewart Edward White to Mrs. Oettinger in 1945, a part of which is set forth at length in the opinion filed January 7, 1952, the substance thereof is that White had no objection to the distribution of copies "provided, of course, it is not in published form." In the opinion the words "in published form" are held to mean "in book form." However, the trial Court, in his opinion, states that this language means that White reserved "publication" rights, and that Mrs. Oettinger was not granted permission to distribute copies of the Gaelic manuscript to the general public. In *Order of Railway Conductors of America v. Swan* (7 Cir., 1945), 152 F. 2d 325, 327, it is said:

> "However, the definitions of words, either common or technical, involve questions of fact and we are bound by the Court's finding as to the definitions if they are supported by substantial evidence."

In view of the foregoing authority, the meaning given to "in published form" by the trial Court should not be changed by this Court.

At this point it can be pointed out that the trier of facts was faced with problems in conconciling the testimony of Maguire and Oettinger. To illustrate, attention is called to the following excerpts from the testimony of Maguire and Oettinger and to the letter from Stewart Edward White to appellee written in 1940. First from Maguire:

> "Q. In your capacity as Mr. White's secretary did you handle any other correspondence between Mrs. Oettinger and Stewart Edward White? A. Yes, a number of letters before this one was written, when she was a resident of Palo Alto, California.
>
> Q. Do you at this time, Mrs. Maguire, have copies of the correspondence that was received and written by Stewart Edward White with Mrs. Oettinger? A. No, sir, I do not.
>
> Q. Do you know whether or not at this time such copies are in existence? A. I think probably not.
>
> Q. Can you recall generally the substance or purpose of the correspondence? A. Yes. I remember that the first letter I was from her and that the first letter I was asked to transcribe in reply to it, was one she wrote Mr. White saying she had just been allowed to read a copy of 'Gaelic' by a Mrs. Katherine Benner in San Mateo, and it had fascinated her so much and interested her so intensely she would like to have other copies and was that possible.

Mr. White replied in a very short letter he had no more copies, he was sorry, but she might, with Mrs. Benner, when Mrs. Benner was through with it, she might make whatever use she could of this one copy. As I recollect, she replied almost at once that since she was so deeply interested she would like more than one copy and would it be possible, would he allow her to make some mimeographed copies for herself.

Q. What was Stewart Edward White's reply, if any, to that request? A. He replied that she was at liberty to do so, he would be glad to have her do it if she wished." [Tr. pp. 92-93.]

Second, from Oettinger:

"A. Yes, she read the copy that I had borrowed of this manuscript and we discussed it, and we both thought that there was some very valuable material in the manuscript and that we would like to have copies. *I called up Mr. White on the telephone* and asked him if we could obtain further copies, and he said that there were no more copies, *and either at that time or in a later conversation on the telephone* I asked him if he would have any objection to any copies being made and *he then invited us to come over to his house and discuss the matter.*" [Tr. p. 121.] (Emphasis added.)

We are compelled to recognize the fact that these two witnesses contradict each other as to whether the arrangements between White and Oettinger were made by correspondence or by telephone and personal interview. It may well be that the trial Judge was impressed by this point in evaluating the testimony of Maguire and Oettinger.

IV.

There Was Substantial Evidence Before the Trial Court to Support the Findings of Fact.

The opinion of the Court holds that the testimony of the witnesses Duce and Stevens is of limited value because it relates to a time not earlier than 1943, and that the testimony of these two, as well as that of the appellee, has no bearing on publication by Stewart Edward White or Mrs. Oettinger. According to the testimony of these three, White gave them very definite instructions, cautioning them to restrict the circulation of the manuscript to carefully selected individuals. As a matter of logic, there is no reason to believe that White would have been any less careful prior to 1943 than he was after that time. It is reasonable to infer that he followed the same careful policy from the beginning. In fact, the appellee testifies as follows:

> "A. I was there alone. I couldn't give you the exact date. It was in the spring of 1941, if I am not mistaken, when I next visited him.
>
> Q. What did Mr. White say? Did Stewart White say anything with reference to limitations? A. He said that Mrs. Oettinger was making these copies. She had been introduced to him by a mutual friend, Katherine Benner, of San Mateo. *He felt her to be a woman of discretion and he could trust her not to broadcast the copies generally, but to use care as to the people to whom she gave them.*" [Tr. pp. 158-159.] (Emphasis added.)

In *Cashman v. Mason* (8 Cir., 1948), 166 F. 2d 693, it is held that, in considering whether the District Courts' findings are clearly erroneous, appellees must be given benefit of all favorable inferences which reasonably may be drawn from the evidence.

In *Paramount Pest Control Service v. Brewer* (9 Cir., 1949), 177 F. 2d 564, before Denman, Chief Judge and Bone, Circuit Judge, and McCormick, District Judge, in the opinion by McCormick, J., the rule is stated as follows:

> "We are not at liberty to substitute our judgment for that of the trial Court, and on appeal that view of the evidence must be taken which is most favorable to the prevailing party; and if, when so viewed, the findings are supported by substantial competent evidence, they should be sustained."

V.

The Findings Are Not Clearly Erroneous Within the Meaning of Rule 52(a).

The weight of the testimony adduced by the appellee establishes that the findings are not "clearly erroneous." The facts and holding in *Baron v. Leo Feist, Inc.* (2 Cir., 1949), 173 F. 2d 288, support this contention. In that case there was a finding that a song had been written by one Belasco some 35 years previously. The Court said that there were some doubts, but it was not an impossible story, and referred to the fact that there was supporting testimony. It was held as follows:

> "We are by no means convinced that the finding that Belasco created the song in 1906 was 'clearly erroneous.'"

Attention is also called to the following:

Egner v. E. C. Schirmer Music Co., supra;
Sawyer v. Crowell Publishing Co., supra;
Esquire v. Varga Enterprises, supra.

A rule pertinent to the instant case is stated in *United States v. Yellow Cab Co.,* 338 U. S. 338, 94 L. Ed. 150, which is expressed in headnote 4 as follows:

> "While it is the duty of the Supreme Court to correct clear error, even in findings of fact, a choice by the tryer of facts between two permissible views of the weight of evidence is not 'clearly erroneous' within the meaning of Rule 52 of the Federal Rules of Civil Procedure."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions.

The opinion filed January 7, 1952, states that "White does not appear in the record as a teacher or a propagandist endeavoring to persuade. He is not pictured as a man with a message." While it is conceded that the record does not show that White was a leader of a cult or was given to public exhortations, yet he did have a metaphysical philosophy of living which he considered to be important, and which he wished to share only with those who were sympathetic toward such ideas. This is shown by the testimony of appellee as follows:

> "Q. Can you list the number of books on metaphysical subjects which Stewart Edward White has written? A. There were 10 all together: 'Credo,' 'Why Be a Mud Turtle,' 'The Betty Book,' 'The Unobstructed Universe,' 'Across the Unknown,' 'The Road I Know,' 'Anchors to Windward,' 'The Stars Are Still There,' 'With Folded Wings,' 'The Job of Living.'" [Tr. p. 152.]

It is respectfully suggested that a man who has written 10 books on a particular subject, does have a message with respect to that subject.

In view of the foregoing, it is urged that this case be viewed in the light of *Shellberg v. Empringham* (1929), 36 F. 2d 991. In this case the plaintiff made available to his patients a large number of reprints of an article which he had written for a medical journal. Copies were kept on a table in his reception room where they might be examined and carried away by patients and visitors. Several thousand persons had access to these reprints. It was held that the primary purpose of the distribution

was to give information to persons interested in the subject discussed in the article, and to relieve the plaintiff Shellberg of the necessity of explaining his system of treatment to those who might wish to learn about it, and that the plaintiff should not be held to have dedicated his article to the public. In the case before the Court the purpose of the distribution of the Gaelic manuscript in the manner shown was for the purpose of giving information to persons interested in the subject-matter thereof and the author should not be held to have dedicated the material to the general public, without discrimination as to persons.

The petition for rehearing should be granted.

Respectfully submitted,

Leslie F. Kimmell,
Attorney for Appellee.

Certificate of Counsel.

It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

Leslie F. Kimmell.